

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:14-cv-14176-ADB

4  
5 STUDENTS FOR FAIR ADMISSIONS, INC.,  
6 Plaintiff

7 vs.

8  
9 PRESIDENT AND FELLOWS OF HARVARD COLLEGE, et al,  
10 Defendants

11 \*\*\*\*\*

12  
13 For Hearing Before:  
14 Judge Allison D. Burroughs

15 Status Conference

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Tuesday, April 10, 2018

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5510, Boston, MA 02210  
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For Intervenor student Amici

1 P R O C E E D I N G S

2 (Begins, 9:00 a.m.)

3 THE CLERK: Civil Action 14-14176, Students  
4 for Fair Admissions, Inc. versus The President and  
5 Fellows of Harvard College. Would counsel identify  
6 themselves for the record.

7 MR. CONSOVOY: Good morning, your Honor, Bill  
8 Consovoy, along with Michael Park, for the plaintiffs.

9 MR. LEE: Good morning, your Honor, Bill Lee,  
10 Felicia Ellsworth, and Seth Waxman, from Wilmer Hale,  
11 for Harvard, and with us is Eric Gershengorn from  
12 Harvard.

13 MR. CREGOR: Good morning, your Honor, Matt  
14 Cregor on behalf of the student Amici.

15 THE COURT: Okay.

16 Let's start with the easier issue first, let's get  
17 a trial date for this.

18 Is everyone all right with October, sometime in  
19 the fall now, is that my understanding?

20 MR. LEE: Yes, your Honor.

21 MR. CONSOVOY: No, we don't object, but I did  
22 -- if I could ask one question? We do want to make sure  
23 the Court has enough time to review the summary judgment  
24 papers in advance of trial. If the Court is comfortable  
25 with replies being due up August 30th and then making a

1 decision about trial in September and starting October  
2 1, we defer to the Court's judgment. But we did want to  
3 make sure we understood your thinking about that.

4 THE COURT: You're only going to ask one  
5 question, that's a world record of efficiency.

6 (Laughter.)

7 THE COURT: So I'm going to set a trial date  
8 for the fall because I don't see -- I had a long  
9 criminal trial scheduled for the fall, that's now been  
10 moved to January, and between my schedule and their  
11 schedule and your schedule, I don't see getting this on  
12 any time quickly unless we schedule it for the fall.

13 I allowed, at your request, you to file the  
14 summary judgment motions, although if this goes on I  
15 still think it makes sort of less and less sense to do.  
16 So we'll certainly have time to review the summary  
17 judgment motions. What we decide to do with them beyond  
18 that, I don't know, but the timing of the trial date  
19 won't make any difference.

20 Okay?

21 MR. CONSOVOY: Understand. Thank you.

22 THE COURT: Okay.

23 I think we're estimating 2 to 3 weeks for this, is  
24 that right?

25 MR. LEE: That's correct, your Honor.

1 MR. CONSOVOY: We think 3. Yeah, I don't  
2 think 2 is reasonable.

3 THE COURT: My fall is now -- since I reserved  
4 all that time for the trial, my fall is very flexible.

5 So you want it in October but not in September, is  
6 that right?

7 MR. LEE: Yes, your Honor. I have another  
8 trial in September that ends September 21st, so if we  
9 can start in October, that would be preferable from our  
10 side of the courtroom.

11 MR. CONSOVOY: October would be the earliest  
12 we could really do.

13 (Pause.)

14 THE COURT: At the moment I don't have any  
15 trial scheduled for October or November, so pick your  
16 three weeks.

17 MR. CONSOVOY: Um, October 15th?

18 MR. LEE: We can start on October 15th.

19 THE COURT: You think that's fine?

20 MR. CONSOVOY: Yeah. Mr. Strawbridge isn't  
21 here this morning, I would want to double-check with  
22 him. But if you want to pick right now, your Honor,  
23 we'll have the 15th.

24 THE COURT: Well, I have October and November  
25 free and you can pick any three weeks you want. So if

1       that doesn't work out, just let me know which three you  
2       want.

3               MR. CONSOVOY:   Okay.

4               MR. LEE:    Can we get back to you by the end of  
5       the day?

6               THE COURT:   Yes.

7               MR. CONSOVOY:   Thank you, your Honor.

8               THE COURT:   All right.   We have the briefing  
9       on the summary judgment sealing issues, but before we  
10      get to that, is there anything else for today?

11              MR. CONSOVOY:   Not for us, your Honor.

12              MS. LEI:    Not for Harvard, your Honor.

13              THE COURT:   Okay.

14              I'm happy to hear you all on this.   This in many  
15      ways highlights for me why I think summary judgment is  
16      not sort of the optimal way to proceed here.   But since  
17      that's what you want to do, we'll do it.   There's been a  
18      lot of briefing on an issue that I really find to be  
19      pretty straightforward and pretty routine.   Portions of  
20      summary judgment motions and the supporting  
21      documentation are filed under seal in this courtroom all  
22      the time, and then we review it, and it either stays  
23      under seal or it doesn't.

24              I'm not inclined to review 90,000 pages of  
25      discovery before a summary judgment motion is filed and

1 make preliminary rulings on what I think should be  
2 sealed and what shouldn't be sealed. So I'm willing to  
3 do this in a couple of ways. I think that my preferred  
4 way would be to do essentially what Harvard suggests,  
5 which is have one filed under seal, a redacted public  
6 version filed at the same time, and then you all meet  
7 right after that and then we all meet as a group right  
8 after that. We could also do it before the summary  
9 judgment motions are filed, essentially the same  
10 procedure, but that cuts your time to prepare your  
11 summary judgment motions.

12 And I would, just for clarification, I'm not  
13 anticipating doing this at the end of the summary  
14 judgment briefing, I'm anticipating doing it when the  
15 opening briefs are filed, and then the response is  
16 filed, and then the reply is filed, if we need to still  
17 do that at that point. So I'm happy to hear you on  
18 that.

19 You know in terms of, um, the point made by  
20 various parties about keeping this under seal, either  
21 we're going to eat into your time to prepare your  
22 summary judgment motions or we're going to eat in the  
23 amici time to do everything, but in looking at the  
24 schedule, it seems like we could do the redacted -- the  
25 sealing and the unsealing pretty quickly and we could

1 extend the amicus brief deadlines from July 13th to July  
2 30th, and then August 17th to August 30th, which still  
3 leaves everything right at the same time but gives them  
4 a little bit more time to deal with the redactions.

5 So I know -- I feel like in many respects this is  
6 a tempest in a tea pot because these things are filed  
7 under seal all the time, and it is not my intention to  
8 keep the summary judgment motions from the public, but  
9 there are most certainly parts of it that should be kept  
10 under seal, and that's what we'll do. So it's a matter  
11 of timing for me more than -- and, you know, whoever's  
12 filing first.

13 I am going to be more sympathetic to the  
14 attachments being filed redacted than I am the legal  
15 briefing being redacted. And I don't expect a 20-page  
16 brief to be filed with a series of black pages. All  
17 right? We're going to be discreet and selective about  
18 what is filed under seal. And like every other summary  
19 judgment motion, there will no doubt be parts that are  
20 under seal, but the bulk of it I expect to ultimately be  
21 available to the public.

22 MR. CONSOVOY: We respect your Honor's ruling.  
23 Of course we take a different view of it, but we  
24 understand the process. In all candor I'm less  
25 concerned about the process than I am about the



1 substance, I think that's been my concern not just  
2 through this stage of the case, but from the beginning  
3 in terms of my client's inability to access the vast  
4 majority of documents that have been produced in this  
5 case because they were labeled "attorney eyes only." So  
6 now it sounds like, given the combined processes we  
7 have, if all that stuff stays "attorneys eyes only" and  
8 Harvard says it concerns the inner workings of its  
9 office, which I think is the vast bulk of the documents  
10 in this case -- and I appreciate the Court's  
11 instructions about being more judicious about that going  
12 forward, I can't show most of my summary judgment brief  
13 to my client before I file it. And I think that's a big  
14 issue.

15 Could I just make one example for the Court this  
16 morning?

17 THE COURT: Is one your number today, one  
18 question, one example?

19 MR. CONSOVOY: No, I don't mean to be  
20 difficult, but I don't think I can make this point.

21 THE COURT: Okay, listen.

22 I would like for his client to be able to read the  
23 summary judgment motions. I think that's reasonable.  
24 So -- and I think we're at a different stage in the  
25 proceedings now. So if there are portions, discrete

1 portions that you don't want his client to see, I  
2 understand that, but his client should be able to sign  
3 off in a meaningful way on a summary judgment brief.

4 MR. LEE: Your Honor, could I say two things  
5 by way of a rebuttal?

6 THE COURT: Two. Absolutely.

7 MR. LEE: This is an entirely new -- your  
8 Honor asked and confronted this issue when we moved to  
9 dismiss and it was SFFA's information that was  
10 confidential, including information that went to  
11 specific members of SFFA, but also information about  
12 their inner workings, and that was kept confidential at  
13 their request, it was kept from the public at their  
14 request, and probably most importantly it was kept from  
15 our client, Harvard, at their request.

16 I think that to the extent that there are -- we  
17 would be happy to meet and confer with SFFA in advance  
18 of their filing. If there are things that they think  
19 they need to, um, show Mr. Blum or SSFA in advance of  
20 the filing, we'll try to work with them, but I think --  
21 I'm just worried about a wholesale license to basically  
22 take the protective order, your Honor's instructions to  
23 us both on what would fall within and what would fall  
24 outside of the protective order, um, and show it to, you  
25 know, Mr. Blum, even if it's just Mr. Blum.

1           So I think this is, like everything else, a  
2     question of "What are we talking about?" And my  
3     experience on the meet and confer is after the redacted  
4     versions are filed, we'll confer both about, um, any  
5     disagreements we have, anything we can agree upon, and  
6     if there's a subset that they think they need to show  
7     their client, we'll try to reach a resolution with them.

8           THE COURT: I will limit it to Mr. Blum and  
9     what I am envisioning here is not a wholesale opening of  
10    Harvard's documents, but you showing him a draft and the  
11    documents that you're citing in your summary judgment  
12    brief so that your client can sign off on your draft.

13          MR. CONSOVOY: That's what I'm asking for.

14          MR. LEE: Yeah, and I assume that your  
15    agreement -- or whatever your Honor orders on it, that  
16    it will be -- Mr. Blum will be around to see it for  
17    purposes of advising on the filing and the motion, but  
18    it's not for the purpose of making it public, or in the  
19    public's view the next day.

20          MR. CONSOVOY: Right. Correct.

21          THE COURT: That is my understanding as well.

22          MR. CONSOVOY: And just -- I don't want to  
23    belabor the point, I'm going to try to do this without  
24    revealing stuff on the protective order right now, so  
25    I'm going to be a little bit vague, your Honor, but

1       here's --

2               Can I hand that up?

3               THE COURT:    Sure.

4               (Hands up.)

5               MR. CONSOVOY:  Your Honor, I'm handing up two  
6 documents.

7               One is the document referenced in the footnote --  
8 and I'm not going to mention what it is because we're in  
9 an open courtroom here, but there was a reference made  
10 in the filing yesterday about some information being,  
11 you know, very confidential, it was the first document  
12 we've seen, and part of my frustration in the process  
13 has been getting Harvard to engage with us on the kind  
14 of documents so we don't end up back in your courtroom  
15 with 90 percent of the record under seal when we come  
16 back for summary judgment.

17              That document was produced to us as "attorneys  
18 eyes only" in this case.  That is not the copy you have.  
19 The copy you have was one I obtained yesterday from the  
20 Illinois University library.  So I was told that's it's  
21 "attorney eyes only," it cannot be shown to my client,  
22 yet it's been in the public domain for 30 years.

23              THE COURT:  It's not the same document, are  
24 they?

25              MR. CONSOVOY:  Um, I don't want to get into

1 the specifics. One was the OCR report from 1990, the  
2 other is the document from the record of this case. If  
3 we're in chambers, I could be more specific, but I  
4 can't.

5 THE COURT: I see it's not the same document,  
6 but you say it contains the same information?

7 MR. CONSOVOY: Yes.

8 MS. ELLSWORTH: I don't have a copy of it.

9 MR. CONSOVOY: I'm sorry.

10 THE COURT: But I get the idea. I can pass  
11 these back and you can show them -- Ms. Ellsworth.

12 MR. LEE: And, your Honor, I think our one  
13 point would be, the first thing is this issue of why  
14 that was out there? The first time we're hearing about  
15 it is now. And we're happy to talk about it.

16 But the second is that the question -- whether  
17 it's in the public domain or not, the question of  
18 whether it's relevant to any motions filed, your Honor,  
19 it's just impossible to determine in the abstract.

20 THE COURT: Well, I'm not going to determine  
21 it in the abstract, um, but that -- that's -- you need  
22 to meet and confer better if there are situations like  
23 that one. And I didn't read it, so I don't know if the  
24 information contained in the two documents is the same.  
25 But I'm going to take his general point that he's saying

1       that there's information publicly available that you are  
2       holding for "attorneys eyes only."

3               MR. LEE:   We hear you, your Honor.

4               MR. CONSOVOY:   I'm going to leave it there for  
5       today, your Honor, it's just -- we're just frustrated  
6       because it's just been difficult to litigate the case  
7       when so much has been labeled in the most extreme  
8       protective order.   I assume, your Honor, that as part of  
9       this process at the end, when we do have disagreements,  
10      you're going to expect more than vague -- "proprietary"  
11      as the case law suggests, there's going to have to be  
12      declarations and supporting information and things that  
13      will justify the kind of redactions that would be  
14      anticipated.

15              THE COURT:   Okay, I'm hoping that, by the end  
16      of the day, we're talking about a handful of them  
17      because the presumption is the information is openly  
18      available.   And to give a general example, you don't  
19      need to put the recipe for Coke into a motion, but you  
20      can allude to the fact that there is a recipe for Coke,  
21      and that is not proprietary information, right?   So I  
22      expect it to be handled in that sort of way.   You know I  
23      appreciate your frustration, my guess is that the people  
24      reviewing the discovery don't know what's on the public  
25      record, that there needs to be some way to sort of

1       communicate that. My guess is that's what happened  
2       there. But I take your point.

3               MR. CONSOVOY: For every document they say is  
4       redacted, we'll show them where it's on the public  
5       record.

6               We can, your Honor, do this in advance. I know  
7       you suggested that we cut our time short. We're happy  
8       to cut our time short. We're happy to share every  
9       document with them. I think we're the ones moving.  
10      They haven't -- Harvard's not said it's moving for  
11      summary judgment yet, so as of now we're the only party  
12      moving for summary judgment. We can share every  
13      document on June 1st with them and be in your courtroom  
14      on June 7th, um, with that material.

15              THE COURT: On what day? Your summary  
16      judgment motions are due at the moment on June 15th,  
17      right?

18              MR. LEE: Yes.

19              MR. CONSOVOY: Correct.

20              THE COURT: So it is my guess that you're  
21      going to have a better -- closer to a final draft on  
22      June 15th than you are June 1st?

23              MR. CONSOVOY: I'm sorry. On June 1st we will  
24      share with them every underlying document that we are  
25      planning to use in support of our statement of material,

1 nondisputed facts, for summary judgment. It's the  
2 documents that ultimately matter because if the document  
3 isn't sealed, then we don't have to change the brief to  
4 accommodate it. If the document is sealed, we need to  
5 find a way to write the brief without it. We can do --  
6 we are ahead of the game on this, we can meet with them  
7 on June 1st and show them every document that will be  
8 filed on summary judgment and get this moving much more  
9 quickly.

10 MR. LEE: So, your Honor, let me just say two  
11 things.

12 THE COURT: Yes.

13 MR. LEE: I don't think we need to resolve  
14 some of these issues.

15 These are two different documents. One of them is  
16 dated 1991, the other is dated 2015, and while they both  
17 refer to "reading procedures," the procedures have  
18 changed over a 16-year period. So this is a problem  
19 trying to do it on the fly, but we'll meet and confer.

20 The second is, on the question of our filing, if  
21 your Honor's going to entertain summary judgment  
22 motions, we haven't made a decision in part because  
23 we're taking the depositions of their -- really their  
24 sole witness, the economist, and this is just me, but I  
25 think there's some fundamental problems with the



1 analysis, and if it turns out to be true, there might be  
2 a summary judgment motion from us. We just haven't  
3 decided at this moment in time. But if your Honor's  
4 going to entertain them, you may see a parallel motion.

5 MR. CONSOVOY: That deposition's in two days,  
6 right?

7 MR. LEE: Yes.

8 MR. CONSOVOY: So we should know fairly  
9 quickly whether Harvard's going to be moving for summary  
10 judgment and we can decide that Harvard's to let us know  
11 whether on June 1st what is what.

12 THE COURT: All right, hold on, I'm just  
13 trying to pull up my calendar.

14 (Pause.)

15 THE COURT: This is not going to accommodate  
16 me. So my suggestion is that you all meet prior to, um,  
17 June 15th, if you want, if you're ready, and that you  
18 then make your filing on June 15th and we meet right  
19 after that, so I can read what's actually filed rather  
20 than, um, guessing on what you're going to file.

21 I'm just trying to pull up my calendar for June.

22 (Pause.)

23 THE COURT: So the 15th is a Friday.

24 (Pause.)

25 THE COURT: So I'm trying to -- the week of

1 the 18th, I'm trying a case that's 10:00 to 4:00, but  
2 I'm happy to meet before or after that and just  
3 hopefully bang this out. If you file on the 18th, give  
4 me a couple of days to read it, so maybe say like the  
5 20th?

6 MR. CONSOVOY: We'll be available whatever,  
7 your Honor, as soon as your Honor wants to come in.

8 MR. LEE: And, your Honor, I'm on trial that  
9 week, but we'll get it covered. We'll have some folks  
10 here.

11 THE COURT: All right. So I'm reasonably  
12 certain that case is going to go, so maybe after you all  
13 meet and confer, you can give me some idea of how much  
14 time you think we need and we'll just simply build in a  
15 schedule for that week for reviewing it.

16 And we can either let -- do you want to -- you  
17 want to meet with me right away or do you want to take  
18 some time to prepare your paperwork in support of your  
19 positions?

20 MR. LEE: Your Honor, I think the latter, but  
21 we'll do it expeditiously so we can meet with you during  
22 the course of that week.

23 THE COURT: Why don't you let me know sometime  
24 between June 1st and June 15th what you want to do for  
25 procedure and when you think you'll be ready to meet.

1 Okay?

2 MR. CONSOVOY: That sounds great.

3 THE COURT: To give anyone who wants to file  
4 an amicus brief, the benefit of what I hope will be a  
5 less-redacted version -- ideally you all file something  
6 that's not so redacted and we can all live with it, um,  
7 but just in case there are things that become unredacted  
8 after this process, um, I think that -- why don't we  
9 change -- so in the scheduling order, the amicus briefs  
10 in support of a dispositive motion, they're to be filed  
11 by July 13th, and we'll change that to July 30th. And  
12 the amicus briefs in opposition to a dispositive motion  
13 are to be filed August 17th, we'll change that to August  
14 30th. We'll do an order to that effect so it's on the  
15 public record. But that will give anyone that wants to  
16 file a responsive brief an extra two weeks.

17 MR. LEE: Thank you, your Honor.

18 MR. CONSOVOY: A date for the reply briefs  
19 then?

20 THE COURT: We don't have a date for amicus  
21 reply briefs but, um --

22 MR. CONSOVOY: It could be the same date as  
23 the movant's reply brief.

24 THE COURT: Right, so your reply brief is due  
25 -- the reply briefs are due, at the moment, on August

1 30th, so we'd have the amicus briefs and opposition  
2 filed on the same day with the benefit of the opening  
3 brief, the responsive brief, but not the reply brief.

4 MR. CONSOVOY: Right, so we want to have a  
5 chance to respond to the amicus who are opposing our  
6 motion, because it will be due the same day, we won't  
7 see their briefs when we file our reply. Am I getting  
8 that right or am I missing it?

9 Amicus who are opposing summary judgment would be  
10 due on August 30th, is that what your Honor is saying?

11 THE COURT: Yes.

12 MR. CONSOVOY: Which is the same day as my  
13 reply brief in support of summary judgment would be due.  
14 So I just wouldn't have a chance to respond to anything?

15 THE COURT: You can supplement if you want.

16 MR. CONSOVOY: Okay, that sounds great. We  
17 might not need to anyway.

18 THE COURT: What we're doing at this point is  
19 spending a lot of time and a lot of money doing summary  
20 judgment briefing if there are -- on issues that would  
21 be decided a month later anyway. Right? So --

22 MR. CONSOVOY: We understand.

23 THE COURT: And I still -- without the benefit  
24 of the briefing, it still strikes me that this is going  
25 to be a fairly fact-intensive inquiry on what the

1 experts have to say.

2 MR. CONSOVOY: We'll do our best to --

3 THE COURT: So I'll tell you this. If we're  
4 denying summary judgment, you can expect a very short  
5 order on factual disputes not appropriate for summary  
6 judgment and we'll go right to trial. If we're granting  
7 them, you know we'll either do an oral thing or, um --  
8 we'll get it done for you. But it's a very short time  
9 between summary judgment briefing and it's a bench  
10 trial, so it's hard for me to, um, really get too  
11 wrapped around the axle about this, because you'll have  
12 your day on the merits this fall, within 6 to 8 weeks is  
13 what we're talking about, depending on what was done on  
14 summary judgment or the bench trial. So --

15 MR. CONSOVOY: We understand. Thank you.

16 THE COURT: Okay, anything else for today?

17 MR. LEE: Nothing for Harvard, your Honor.

18 THE COURT: You all will meet and confer. If  
19 you want the time to prepare your brief, you can do it  
20 afterwards, if you're really ready to go, you can do it  
21 before. The brief will be filed on June 15th. You'll  
22 give me a proceeding for when you all want to have a  
23 chance to prepare your paperwork. I am here and will  
24 make myself available and we'll get this done quickly.  
25 But I am happy to engage in this activity with you.

1           But I want to be clear that I don't expect to get  
2   pages and pages of blackness on the record. So you'll  
3   file an unredacted version with me and they'll be some  
4   kind of redacted version filed on the public record that  
5   hopefully, um -- I understand they'll be redactions, but  
6   hopefully there are not so many that the document is  
7   incomprehensible to someone that's trying to read it.

8           MR. CONSOVOY: We understand, your Honor.

9           MR. LEE: Thank you, your Honor.

10          THE COURT: Okay.

11          Anything else? I see Ms. Ellsworth was --  
12   nothing?

13          MS. ELLSWORTH: No, your Honor.

14          THE COURT: Okay.

15          All right, so we'll see everyone in June or  
16   thereabouts. Thank you.

17          (Ends, 9:30 a.m.)

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## C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge Allison D. Burroughs, on Tuesday, April 10, 2018, to the best of my skill and ability.

/s/ Richard H. Romanow 04-12-18

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RICHARD H. ROMANOW Date